United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1154

ORIGINAL

To be argued by
JOHN H. DOYLE, III

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P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

HOWARD FINKELSTEIN, a/k/a ROBERT HOWARD, ANTHONY SCARDINO, ALAN SEGAL and EDWARD ZUBER,

Appellants.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR APPELLANT, ALAN SEGAL

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PRELIMINARY STATEMENT

Appellant Alan Segal ("defendant") submits this brief in reply to the brief on appeal filed by Appellee and in support of his appeal from a judgment of conviction entered on March 31, 1975, by United States District Judge Lloyd F. MacMahon.

THE GOVERNMENT'S STATEMENT OF THE FACTS

Although this Court in reviewing the record must draw those inferences from the evidence most favorable to the Government, there is no justification for the Government's one-sided presentation of the facts, ignoring testimony from its own witnesses and documents which formed the basis for the arguments presented by defendant to the jury. These omissions are particularly serious because the errors committed by the trial court unfairly impaired defendant's ability to present his defense effectively.

Defendant's defense can be summarized as one of good faith, including a sincere belief that Pioneer had a valuable mining claim and would be a profitable company. Accordingly, it is important for this Court to be aware of the testimony of the chief Government witnesses, Acton and Clegg, who explained at great length their own respective sincere beliefs in the value of the mining claims that Pioneer acquired. (See Defendant's Brief at pp. 14-17, 20).

In that portion of its brief where the Government does discuss the Lone Tree Mining Claims acquired by Pioneer, it makes a specious attempt to minimize their importance. From the facts that it was not until December 3, 1969 that Pioneer finally acquired the Lone Tree Mining Company, and that the Lone Tree Company was not even formed until November 20, 1969, the Government concludes that there was no evidence of good faith on the part of defendant. (See Government's Brief p. 10). This argument is grossly misleading, because the record amply establishes that Acton and Clegg intended to acquire the Lone Tree Mining Claim from the very beginning of their connection with Pioneer and that they expressed this intention to defendant from the outset of their relationship with him. (JA 219-221). In view of the fact that the mine was actually acquired, the defense of good faith was an entirely cogent one.

The Government has omitted any reference to the evidence adduced from Acton, Clegg and Schiffman that Pioneer's attorney, Ted Frazier, had advised them and defendant that Pioneer stock was freely trading under the "grandfather clause" because the stock had been issued prior to 1933. (See Defendant's Brief at pp. 16, 19, and 22). From the Government's version of the facts it would appear that there was no defense whatsoever to the Section 5 allegations of the indictment whereas in fact the Government's own wit-

nesses furnished the predicate on which defendant's good faith belief in the legality of his conduct could be argued to the jury.

Finally, the Government states that it was the defendant Segal who "manipulated" the price of Pioneer. (See Government's Brief at p. 4). The record fails to support this sweeping conclusion. The trading in Pioneer stock was conducted by about fifteen over-the-counter brokerage firms during the pertinent period, but the only firms at which the defendant conducted substantial and active trading were Karen & Company, Orvis Bros. and Economic Planning. (JA 534) Indeed, the Government witness Michael Karfunkel stated that in 1969 his firm, Economic Planning, was trading Pioneer stock at a profit - an activity that defendant had nothing to do with until early January 1970* when he had his first conversation with Karfunkel. (JA 1064) Moreover, the Government also fails to point out that Schiffman, who was defendant's attorney, never told him that there was anything illegal about the transaction at Karen. (See Defendant's Brief, p.23). The Government offered no expert or other competent testimony from which the jury could infer that defendant "manipulated" the price of Pioneer stock.

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* Karfunkel testified to some conversations with Azzerone about Pioneer but did not ascribe his activity in the stock to those conversations. (JA 1038).

With respect to one of the investor witnesses, Doniel Aymes, the Government makes the misleading statement:

> "[Defendant] Segal never paid Aymes for the stock; instead he drafted two checks which both bounced (J.A. 967)" (Government's Brief at p. 15).

The Government unfairly fails to point out that defendant subsequently paid Aymes' brokerage firm for the shares purchased by Aymes. (J.A. 968, 970; DxK). Finally, the Government includes in its Statement of Facts reference to the existence of an indictment with respect to a company called Select Enterprises, even though no evidence was received or offered with respect to that unrelated case. (See Government's Brief, p. 17, footnote **.)

The Government's attempt to belittle defendant's proof on his own case concerning the witness Byron Buttram completely misses the point. The Government argues that from the fact that defendant's first conversation was on November 24, 1969 and his meeting took place in January 1970, Buttram's testimony

> "...actually supported the prosecution by revealing the passing and belated interest that [defendants] had in the viability of the mine" (Government's Brief at p. 26).

Buttram's testimony about his conversation and meeting with defendant confirmed defendant's sincere interest in and belief in the viability of the mine, a state of mind that defendant had from the very outset of his involvement with

Pioneer. (JA 219-221; 1153-1154, 1157-1158) The fact that defendant first spoke to Buttram in November does not detract from the positive probative value of Buttram's testimony that defendant asked for and received specific technical information about the mine, from which it was a fair inference that defendant's good faith belief in the mine was genuine.

The Government also makes much in its Statement of Facts about defendant's failure to provide $500,000 to Clegg to commence the commercial operation of the mine. The Government fails to point out, however, that there was no evidence that defendant ever netted $500,000 or indeed that he made any net profits whatsoever from his trading in Pioneer, since he was also making substantial purchases of Pioneer stock and the Government's chart as to his sales did not purport to be a reconciliation of profit and loss with regard to his trading in the stock. (JA 467, 676-677, 823, 1112)

POINT ONE

THE GOVERNMENT HAS INCORRECTLY STATED THE LAW REGARDING PREINDICTMENT DELAY AND HAS FAILED TO REFUTE DEFENDANT SEGAL'S SHOWING OF ACTUAL PREJUDICE

The Government contends from misreadings of United States v. Marion, 404 U.S. 307, 324 (1971), United

States v. Frank, Dkt. No. 74-2639 (2d Cir., June 27, 1975), slip op. at 4446; and United States v. Brown, 511 F.2d 920, 923 (2d Cir. 1975) that there is a "two-tier" requirement under the due process clause requiring proof of both substantial prejudice and wilfull Government misconduct in order to require dismissal of an indictment for pre-indictment delay. (Government Brief at p. 56) The Government omitted from its quotation from Marion the following words appearing at the beginning of the quoted sentence at p.56 of the Government's Brief: "Thus, the Government concedes ..." (emphasis supplied). The fact that the Government conceded that point does not mean that it was adopted by the Supreme Court. Indeed the contrary interpretation of Marion appears correct. The defendant there did not assert any prosecutorial misconduct nor make any showing of it, having contended that the delay was "due to negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury." (Marion, supra at 310). Nevertheless the Supreme Court explicitly stated:

> "Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." (Id. at 326)

While the Supreme Court did refer to the absence of any claim or proof of actual prejudice in that case, and to the absence of a showing of intentional delay by the Government to obtain a tactical advantage, the court nowhere stated

that both of these requirements must be met in order to justify dismissal on Fifth Amendment due process grounds. (See id. at 325). Moreover, in Brown, supra, this Court did not express any such two-pronged test, but merely referred to the absence of proof in the record of either actual prejudice or prosecutorial misconduct. The operative section of Brown is as follows;

> "Chief Judge Mishler denied a motion for a hearing to compel the prosecution to explain the reasons for this delay as a preliminary to a possible further motion to dismiss the indictment. The mere lapse of time between the fingerprint indentification on June 5, 1972 and the filing of the indictment on November 1, 1973 constitutes no proof that Brown was prejudiced by the delay nor does it in the slightest degree indicate any foul play by the prosecution designed to deprive Brown of a fair trial or to affect his rights in any manner.
>
> There is a surprising amount of discussion in numerous opinions of various Courts of Appeals in the federal judicial system relating to what might some day be proved or even plausibly alleged by a defendant in a criminal case to justify the dismissal of an indictment for prosecutorial misconduct in failing promptly to seek an indictment. That there must be some such showing is the mandate of United States v. Marion, 404 U.S. 307, 325, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Here the record is completely bare as to prejudice to the appellant and as to prosecutorial misconduct. The motion for a hearing was properly denied. We do not think that what was said in United States v. Ferrara, 458 F.2d 868 (2d Cir.) cert. denied, 408 U.S. 931, 92 S.Ct. 2498, 33 L.Ed.2d 343 (1972), was intended in any way to change the rule as formulated in Marion." (511 F.2d at 922-923).

In its comment that "there must be some showing", the Court was referring to what standards of proof and of pleading would apply to a claim of prosecutorial misconduct. In stating that the record was bare as to prejudice and as to misconduct, the Court was not stating that both must be proven but rather that the absence of proof as to either demonstrates insufficiency of a defendant's showing.

Finally, in Frank, all the Court stated was that there was neither prosecutorial misconduct nor actual prejudice. Here again, the Court was not suggesting that proof of one aspect of the test but not the other would be insufficient. Slip. op. at 4446.

In the case at bar, defendant has demonstrated actual prejudice from the fact that important material disappeared from the "due diligence file" over the years as it changed hands from Azzerone to the SEC to the United States Attorney's office, particularly the Hatsis report on offers made by the Howard Hughes organization of several millions of dollars for the Lone Tree Mining Claims. (See Defendant's Brief pp. 15-17).

The Government's version of Schiffman's testimony on the due diligence file is mistaken. Schiffman testified that in the Fall of 1969 he attended a meeting at the Century Plaza Hotel in Los Angeles with defendant, Clegg, Acton and Jay Walker. Schiffman asked for some financial

statements and a couple of hours later Clegg gave him some typed sheets concerning assets and liabilities of the company. After looking at these sheets Schiffman told defendant that he did not think that based on this information that there were adequate facts or proof about the assets of the company, whereupon Schiffman and defendant returned to New York. On the trip back, Schiffman reiterated that they would have to have further proof of the assets and of what they were worth before Schiffman could recommend that defendant invest in the company. Up to that point Schiffman had seen "no actual proof of the value of any of the assets that they owned nor of the ones that they intended to acquire." (JA 425-427). After this trip, defendant gave Schiffman the due diligence file which Schiffman described as follows:

> "Q Did you read this due diligence file yourself?
>
> A Well, I looked through it. It was something about mines, and not being an expert in mines and not being an expert in mines and not being able to understand it, I didn't really read it." (JA p. 427-428)

Thus, it is clear from the record that Schiffman's pessimistic comments about the assets of the company were made before he saw the due diligence file, not afterwards as the Government contends.

Furthermore, the Government unfairly states that

> "counsel made little attempt to explore the contents of the 'due diligence file'; indeed Schiffman's suggestion that there may have been an additional quarter or half inch of papers was left unexplored." (Government Brief at p. 59)

In fact, on cross examination, counsel clarified the fact that the due diligence file "was delivered to [Schiffman] wholly independently of the meeting that [Schiffman] had in Los Angeles by Mr. Torres, who was an employee of [defendant] in New York City." (JA 461) Counsel then asked the following question and the witness answered as follows:

> "Q Can you describe, sir, your recollection of the due diligence file as to its contents concerning what was in it to the best of your recollection?
>
> A Well, there was a report on the mine, mercury mine, I believe it was, and there was some information and financial statements on a company, Precision something or other, Precision Power or something like that." (JA 461)

Counsel then asked Schiffman to elaborate as to the physical appearance and thickness of the file and he elicited from Schiffman that the mining report was in a binder and the rest of it was all put into a manilla envelope. (JA 461-462). Schiffman then identified the "mining report" as Government's Exhibit 6B.

It can hardly be plausibly argued that counsel's question to Schiffman requesting his recollection "of the

due diligence file as to its contents" was an insufficient effort to explore its contents. Schiffman had obviously fully stated his recollection of the contents of the file and the record is complete on that point. Nowhere did Schiffman refute Acton's testimony that the Hatsis report was part of the due diligence file.

Again distorting the record, the Government characterizes Azzerone's description of the due diligence file as "a financial statement" whereas in fact Azzerone testified that the due diligence file consisted of a financial statement "plus other things that [he didn't] recall." (JA 531).

Finally, the Government reiterates its patently specious argument that the due diligence file would have been of no probative value because defendant had commenced selling Pioneer stock as early as October 30, 1969, whereas the Lone Tree Mine was not formed until November 20, 1969 and the "conspirators" did not purchase the mine until December 3, 1969. Defendant's actual contention, supported by the proof, was that Pioneer intended to acquire the mine; that Pioneer did acquire the mine; that all concerned believed that the mine was very valuable; and that substantial documentary and expert proof of that value was included in the due diligence file and then lost during the lengthy delay in the Government's investigation.

POINT II

THE GOVERNMENT HAS FAILED TO JUSTIFY ITS RECEIPT IN EVIDENCE OF THE CIVIL INJUNCTION AGAINST DEFENDANT

Conceding that Schiffman's testimony did not furnish any link between the civil injunction and defendant's state of mind in connection with the use of nominees, the Government advances the novel argument that the injunction could have been received through "any witness" since defendant had opened the door by cross-examining Schiffman about his use of nominees. (See Government Brief p. 64). This contention must fail, however, because there was a complete absence of proof that the terms of the injunction had ever been explained to defendant or even called to his attention. Without such proof, there was no proper foundation for its receipt in evidence as to defendant's state of mind concerning nominees.*

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* Although the terms of the injunction include a recitation that it was issued on the "consent of the defendant" (JA 1545), such a bare recitation is insufficient evidence of defendant's actual knowledge of its contents and would indeed be inadmissible as hearsay if offered for the truth of its contents. We also note that inadvertently included in the appendix is a document not offered or introduced into evidence consisting of an acknowledgement by the defendant that he had received the proposed judgment of permanent injunction, had read it, and consented to it with the following reservations: "I deny all the allegations contained in the foregoing papers but nevertheless consent to the attached injunction and waive all my rights to a trial on the merits" (JA 1558). Since this document was not offered or received, it cannot be considered by this Court in assessing the sufficiency of the foundation for introduction of the injunction.

Further, the Government makes the mistaken claim that "at no time did the Government's attorney state that [defendant] violated the terms of the injunction" (see Government's Brief p. 66). This statement is incomprehensible in view of the argument made by the prosecutor in his summation and referred in Defendant's Brief on page 42:

> "He knew that by every move that he made with securities he was violating an injunction, acting unlawfully. This is the man who comes before you now, by Mr. Doyle, and argues good faith, innocent intent." (JA 1338) (emphasis supplied)

This argument was directly contrary to the trial Court's instructions, which Government counsel knew would be given before his summation, to the effect that defendant was not charged in this case with having violated the injunction and that it was offered solely to establish that he may have used nominees because of it. (JA 1393-94). Thus, the Government improperly submitted for the jury's consideration the accusation that defendant had violated the injunction through his dealings in Pioneer.

It is no answer to suggest, as the Government has at p. 66 of its brief, that this was not error because the jury heard the injunction read to them by the prosecutor and had it available to them for examination in the jury room. The problem here was not an incorrect interpretation of the injunction, but the injection by the prosecutor of an issue

that he knew the jury would be specifically interdicted from considering, i.e., defendant's alleged violation of the injunction. This was clearly reversible error. See United States v. Torres, 503 F.2d 1120, 1126 (2d Cir. 1974); United States v. Gonzalez, 488 F.2d 833, 836 (2d Cir. 1973); United States v. Grunberger, 431 F.2d 1062, 1068-69 (2d Cir. 1970).

Understandably, the Government makes only a cursory claim that the errors surrounding the receipt and use of the injunction were harmless. (Government's Brief at p. 67) The fact is inescapable that the receipt of the injunction and the government's charge that defendant violated it were devasting to defendant's argument of good faith, and conclusively turned the tide against him on this crucial issue.

POINT III

THE STATEMENTS OF EDDIE LEVINE HAVE NOT BEEN CONNECTED TO DEFENDANT DIRECTLY OR INDIRECTLY AND THE RECEIPT OF THESE STATEMENTS AND THESE FRUITS WAS REVERSIBLE ERROR

The Government appears to have completely missed the point of defendant's contention respecting the receipt of Eddie Levine's extrajudicial statements against defendant, and the receipt of the testimony of investor witnesses whose only connection to the case was through Eddie Levine. The government contends that Eddie Levine's statements were not

offered to prove the truth of the matters therein asserted. (Government's Brief, at p. 69) However, the only conceivable basis for connecting them to defendant was Eddie Levine's statement that "his father and some other gentlemen were in on some stock deals and that this stock will earn over $2 a share on dividends within a few weeks" (JA 895). If that statement was not received for the truth of the matter asserted, Eddie Levine's conversations with various investors were not linked directly or indirectly to defendant or even to Jack Levine, as to whom a judgment of acquittal was directed by the Court. The government simply does not explain how Eddie Levine's "verbal acts" were in furtherance of the conspiracy charged in this indictment as distinguished from independent (and unrelated) activities.

Even less germane is the Government's alternative argument that Eddie Levine, even if not a wilful co-conspirator, may have been acting as an innocent agent of defendant in furtherence of a scheme to defraud. (Government's Brief at p. 70) The failure of proof was not as to fraudulent intent on the part of Eddie Levine, but rather the absence of any evidence connecting Eddie Levine with defendant or with anyone acting in concert with defendant.

Given the Government's utter failure to confront this issue, it is understandable that it goes to great lengths to argue that any errors committed here were harm-

less. (Government Brief at pp. 70-72) In this connection the government completely ignores the specific claims of prejudice made by defendant in his brief at pp. 52-53. The testimony concerning Eddie Levine and of the witnesses who purchased Pioneer stock on the strength of his touting was the primary vehicle for the Government's argument that this case was a massive fraud on the unsuspecting public. Thus, the prejudice was in no sense confined to specific counts of the indictment relating to witnesses whose purchases resulted from Eddie Levine's recommendations. Here again, defendant's defense of good faith was undermined by the improper receipt of highly prejudicial evidence.

POINT IV

THE GOVERNMENT HAS NOT JUSTIFIED THE UNDUE CURTAILMENT OF THE CROSS-EXAMINATION OF CLEGG

As set forth in Defendant's Brief at pp. 60-61, the Trial Court permitted Clegg to deny that his conviction involved "the sale [by Clegg] of black boxes or blue boxes consisting of apparatus to obtain free long distance service from the Telephone Company". (JA 648) When defendant's counsel attempted to find out what the conviction did involve, the Government's ojection was sustained. Contrary to the Government's suggestion, defendant's counsel was led to believe by the Court's ruling that no further questions on

this point would be permitted. As a result, the jury was left with only Clegg's general denial and was completely in the dark as to what the fraud consisted of. This curtailment was particularly damaging because the actual crime involved was one involving blatant thievery from the Telephone Company -- a fact the jury never learned and in fact was told by Clegg did not exist.

While it is true, as the Government asserts, that Clegg's credibility had suffered a "substantial loss" when it was shown that he had lied on cross-examination about selling Pioneer stock, Clegg's testimony was also the most telling against defendant, and thus, impeachment of it was particularly crucial. It was Clegg who furnished explicit testimony about defendant's alleged reference to the "shoe box" for Pioneer stock, who accused defendant of defrauding Clegg's relatives of the price paid for their stock, who claimed that defendant had promised to provide $500,000 in operating capital for the mine and who testified that Clegg and Acton had asked defendant to be an "underwriter" for Pioneer. (JA 546) (See Defendant's Brief at p. 17). If the jury had disbelieved this highly prejudical testimony, it might well have found Acton's testimony insufficient and have accepted defendant's defense of good faith.

CONCLUSION

For the reasons set forth herein and in Defendant's Brief, this Court should grant the relief requested at p. 65 of that Brief.

Respectfully submitted,

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A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA.,

Appellee,

- against -

HOWARD FINKELSTEIN, etal.,

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*

1235 Plane Street, Union, N.J. 07083

That on the 12th *day of* September *19* 75, *deponent served the annexed* Reply Brief

upon Kirschner & Greenberg *attorney(s) for*

Zuber *in this action, at* 10850 Wilshire Blvd, Los Angeles, Cal., 90024

the address designated by said attorney(s) for that purpose by depositing 2 *true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 12th
day of September *19* 75

Print name beneath signature

EUGENE L. ST. LOUIS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, *against* HOWARD FINKELSTEIN, etal., Appellants.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the 12th *day of* September *1975 at*
1) ~~Irving Weinberger~~ 770 Lexington Ave, N.Y., N.Y.
2) 36 E. 44th St., N.Y., N.Y.
3) 1 St. Andrews Pl., N.Y., N.Y. *upon*

deponent served the annexed Reply Brief
1) Irving L. Weinberger
2) Eleanor Jackson Piel
3) Paul J. Curran

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

James Steele
Print name beneath signature
JAMES A. STEELE

Sworn to before me, this 12th
day of September *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977